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Review of North Dakota Decisions

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BAR BRIEFS

REVIEW OF NORTH DAKOTA DECISIONS

Stanley Gallagher vs G. N. Ry. Co. Appeal was taken from trial court's order overuling a demurrer to complaint in action for personal inquries, the complaint alleging custom of defendant to block only available crossing in Town of Tagus by its trains, the custom of residents of the town to pass thru, over and under such trains when said crossing was so blocked, the blocking for more than 20 minutes of said crossing on a bitter cold day in December, the attempt of the plaintiff, a boy of 14, to cross between the cars, the sudden movement of the train—without signal or other warning—and the permanent injuring of plaintiff. HELD: that facts are sufficient to constitute cause of action; that defendant's negligence may reasonably be inferred therefrom; and that they do not disclose contributory negligence on the part of the plaintiff, which term is relative and dependent upon the particular circumstances of each case.

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Standard Oil Co. vs Guaranty Fund Commission. Facts must be much abbreviated in this case. Collections of the plaintiff at various small points were taken to local banks by plaintiff's agents, orders taken therefor and transmitted to plaintiff's Fargo office, the local agents having no authority to cash the orders or to issue checks against the amounts so placed in the local banks. The banks, however, treated such amounts as deposits and paid assessments to the Guaranty Fund based on statements including these sums. Upon the closing of a number of the banks, plaintiff made claim to the Guaranty Fund. Hearings were held, evidence taken, and claims rejected on ground plaintiff was not a depositor. Mandamus was brought to compel allowance of claims. HELD: Mandamus will lie to compel action arbitrarily or fraudulently refused, but official discretion in acting can not thus be controlled by the courts. "Since this Fund belongs to the State and the State has not consented to be sued, any rights which the plaintiff may have in the Fund must be established in the manner prescribed by the Legislature, subject to any restrictions that the Legislature may see fit to impose"; and this does not constitute the depriving of property without due process of law. *Wiff vs the Commission, and Bishop vs the Commission,* heard at the same time, hold that certiorari will not lie to review the acts of the Guaranty Fund Commission.

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Keystone School District No. 7, Dickey County, vs Oster and Gebhardt.—Defendants signed as sureties on depositary bond given plaintiff by Bank M. The bond provided that notice of any default must be given to the defendants within 90 days after knowledge of default by plaintiff. The bank closed in March, 1923; in May, 1923, inquiry was made of the plaintiff's treasurer, who was in charge of the Bank under the Receiver, and brought the information that the money could not be turned over; at the same time attempts were being made to re-organize the bank and plaintiff signed a depositors' agreement; in October, 1923, claim was made to the Receiver; and in January, 1924, demand was made on the Bank for payment, notice

of default in which was given defendants. HELD: Such notice was not too late. The aid of courts can not be invoked to escape liability on part of sureties through technical or hypercritical construction of their contract. The closing of the bank did not constitute default within the terms of the bond requiring notice.

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Highway Commission vs State Auditor. House Bill 162 of the 1927 Session, creating new Highway Commission, passed the House February 21st, the emergency clause being declared lost, and the bill so endorsed. It went to the Senate where it was amended, and reported back to the House, with the notation that the emergency clause had carried. The House concurred in the Senate amendments and, on final passage, the emergency was declared carried. HELD: The legislative record does not contradict the declaration in the enrolled bill and does not disprove that the measure passed both houses by more than the constitutional vote required to carry the emergency clause.

WORKMEN'S COMPENSATION DECISIONS

An oil refining company maintaining wholesale selling stations, conducted by agent on a commission basis, such agent to furnish own labor and distributing equipment, all assistants to be hired and paid by him and to work under his direction, is not liable for injury to such assistants, the assistants not being employees of the company.—*Associated Industries Insurance Co. vs Ellis,* 16 *Fed. Rep.* 464.

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Industrial Commission, though not a court, determines questions of fact under the Compensation Act, and its findings are entitled to same treatment on review as those of trial court.—*Fed. Mut. Liability Ins. Co. vs Industrial Commission,* 252 *Pac.* 512 (*Ariz. Dec.* 1926).

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Independent contractor, or employees of independent contractor, not covered by compensation act. Son working for father, who had sole right to hire and discharge his crew, and who agreed to saw logs at fixed price for school, the school reserving right to stop work, not an employee of school district.—*Montezuma Mountain Ranch School vs Industrial Commission,* 251 *Pac.* 948 (*Cal. Dec.* 1926).

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Employee engaged in hauling with own team who drove from place of work to his home for purpose of eating and feeding team, and suffered injury while unhitching team, not injured in course of employment.—*Jotich vs Village of Chisholm,* 211 *N. W.* 579 (*Minn. Jan.* 1927).

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Notwithstanding settlement by third party with injured employee, under the statute giving right of subrogation (as in N. Dak.) suit may be brought against negligent third party, and recovery had.—*Smith vs Yellow Cab Co.,* 135 *Atl.* 858 (*Penn. Jan.* 1927).